

**POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS (INCLUDING
PROCUREMENT INTEGRITY ACT**

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**POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS (INCLUDING
PROCUREMENT INTEGRITY ACT)**

*“Always do right. This will gratify some people and astonish the rest.”
Mark Twain*

I. REFERENCES.

A. Statutes.

1. 18 U.S.C. § 208, Acts Affecting A Personal Financial Interest.
2. 41 U.S.C. § 2101-2107, formerly known as the Procurement Integrity Act.
3. 18 U.S.C. § 207, Restrictions On Former Officers, Employers, And Elected Officials of The Executive And Legislative Branches.

B. Regulations.

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.
2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics, however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991. *See also*, Office of Government Ethics Proposed Post-Employment Conflict of Interest Restrictions Regulation which supersede 5 C.F.R. part 2637 when that rule became final. 68 FR 7844 (February 18, 2003), 2003 WL 345140; SEE NUMBER 11 BELOW.
3. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions. (JER 9-200, See “C” below)
4. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208.

5. OGE Memorandum, Revised Materials Relating to 18 U.S.C. § 207 (February 17, 2000, see D(1) below).
 6. GENERAL SERVS. ADMIN. (GSA), FEDERAL ACQUISITION REG. 48 C.F.R. Part 3 (10-1-07)(referred to in the outline as 48 C.F.R. or as FAR).
 7. DEFENSE FEDERAL ACQUISITION REG. SUPP. 48 C.F.R. Part 203 (10-1-07).
 8. National Defense Authorization Act for Fiscal Year 2004 (PL 108-136), section 1125.
- C. Department of Defense Directive 5500.07-R, JOINT ETHICS REGULATION (JER) (August 30, 1993).
- D. Miscellaneous:
1. Summary of Post-Employment Restrictions of 18 U.S.C. 207, <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2199>
 2. Memorandum for Amy Comstock, Director, Office of Government Ethics from U.S. Department of Justice, Office of Legal Counsel, dated January 19, 2000(sic, should be 2001) <http://www.justice.gov/olc/207cfinal.htm>. See accompanying March 15, 2001 DAEOgram at <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2029>. The opinion is also available at the web site of the Department of Justice, Office of Legal Counsel, at <http://www.usdoj.gov/olc/207cfinal.htm>.
 3. Post-Government Service Advice (See Publications and Handouts in the Ethics Resource Library at the DoD SOCO Web site at http://www.dod.mil/dodgc/defense_ethics/resource_library/pubhandout.htm including at f below).
 - a. Seeking Employment Restrictions (Rules When You Are Looking For a New Job)
 - b. Employment Restrictions (Rules Affecting Your New Job After DoD)
 - c. For Military Personnel E-1 through O-6 and Civilian Personnel Paid at less than 86.5% of the rate for Executive Schedule Level II

- d. For Civilian Personnel Paid at or above 86.5% of the rate for Executive Schedule Level II and Flag and General Officers
 - e. Disqualification Statement
 - f. Procurement Integrity Act Restrictions (Rules When You Are Looking For a New Job & Rules Affecting Your New Job After Leaving DoD)
4. 5 C.F.R. 2641 App. B (68 FR 4683, January 30, 2003) (Department of Defense component parts for 207(c) purposes: Department of the Army, Department of the Navy, Department of the Air Force, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Threat Reduction Agency, National Imagery and Mapping Agency (now renamed National Geospatial-Intelligence Agency per the National Defense Authorization Act for Fiscal Year 2004), National Reconnaissance Office, and the National Security Agency. 5 C.F.R. 2641 (appendix B).
5. Office of Personnel Management Notice of 18 U.S.C. 207(c) restrictions, 5 CFR 730.104.
6. Office of Government Ethics DAEOgram DO-04-029 (seeking employment). <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2188>
7. Office of Government Ethics DAEOgram DO-04-023 (summary of Post Employment law) <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2199>
8. Memorandum of the Deputy Secretary dated October 25, 2004 regarding Joint Ethics Regulation changes to include post employment issues in annual training found under the ethics resource library, DoD Guidance, at http://www.dod.mil/dodgc/defense_ethics/dod_oge/OSD_15517-04.pdf. Also, at the same web site is the annual certification required to be signed by all public financial disclosure filers.
9. (S.1, P.L. 110-81). See SOCO advisory http://www.dod.mil/dodgc/defense_ethics/2008_Advisories/ADV_0803.htm.
10. OGE Post-employment regulation, final rule, <http://edocket.access.gpo.gov/2008/pdf/E8-13394.pdf>.
11. National Emergency Extension: <http://www.gpo.gov/fdsys/pkg/FR-2011-09-13/pdf/2011-23609.pdf>

12. January 21, 2009 Executive Order and Pledge and OGE interpretation:
<http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf>.

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=261>

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=245>

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=258>

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=250>

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=253>

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2147483918>

13. Change in the Simplified Acquisition Threshold:

<http://edocket.access.gpo.gov/2010/pdf/2010-21025.pdf>. 75 FR 53129-53135 (Aug. 30, 2010) effective October 1, 2010.

14. Change in the “minimal value”: <http://www.gpo.gov/fdsys/pkg/FR-2011-07-01/html/2011-16642.htm> . 76 FR 38547 (July 1, 2011) effective January 1, 2011.

II. INTRODUCTION. THIS OUTLINE COVERS:

- A. The conflict of interest prohibitions of 18 U.S.C. § 208 as they apply to Government personnel who are seeking outside employment.
- B. The coverage of what was formerly referred to as the Procurement Integrity Act.
- C. The procurement-related restrictions on seeking and accepting employment when leaving Government service.
- D. The post-Government service employment restrictions of 18 U.S.C. § 207

III. ROAD MAP

- A. Purpose of Restrictions
- B. Seeking Employment
- C. Federal Employment Restrictions

- D. Private Employment Restrictions
- E. Foreign Employment Restrictions

IV. PURPOSE OF RESTRICTIONS

- A. Prevent Conflicts of Interest
- B. Promote Economy in Federal Government
- C. Expand Employment Opportunities in the Federal System
- D. Preserve the public's confidence in Government Integrity

V. RENDERING COMPETENT ADVICE

- A. Need Full Disclosure (Client Questionnaire)
- B. Who is the client? (JER section 9-500)
- C. Effect of Advice?
- D. OGE will Audit whether counseling is provided, records are kept, and if the advice is accurate.

VI. SEEKING EMPLOYMENT

- A. Conflicts of Interest
- B. Gifts from Prospective Employers
- C. Working on Terminal Leave

VII. FINANCIAL CONFLICTS OF INTEREST. 18 U.S.C. § 208; 5 C.F.R.

§ 2640.103. Prohibits an employee from participating **personally and substantially** in his or her official capacity in any **particular matter** in which he or she has a **financial interest**, if the particular matter will have a **direct and predictable effect** on that interest.

- A. Specifically, an employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.

- B. Definition of key terms.
 - 1. Financial Interests. Defined as a potential for gain or loss on interests such as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c); 5 C.F.R. § 2640.103(b). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

 - 2. Personally. Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).

 - 3. Substantially. Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).

 - 4. Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).

 - 5. Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest. 5 C.F.R. § 2635.402(b)(1); 5 C.F.R. § 2640.103(a)(3).

- C. The financial interest of a person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment (5 C.F.R. § 2635.402(b)(2)(v); 5 C.F.R. § 2640.103(c)) is imputed to the employee.

- D. This statute does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions. See JER, para. 5-301 (which also includes members of the National Guard). Regulatory implementation of 18 U.S.C. § 208 is found in the JER, Chapter 2 and Chapter 5.
- E. Options for employees with conflicting financial interests.
1. Disqualification. With the approval of his or her supervisor, the employee must disqualify to eliminate any contact or actions affecting that company. 5 C.F.R. § 2635.402(c); 5 C.F.R. § 2640.103(d).
 2. Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter on a case-by-case basis after the employee fully discloses the financial interest to the agency and receives a written waiver. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

(Practice Note: Since most employees derive a substantial portion of their income from their employment, it is rare that a 208(b)(1) waiver will apply under these circumstances.)

- F. Negotiating for employment. The term “negotiating” is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).
1. Any discussion, however tentative, is negotiating for employment.
 2. The Office of Government Ethics (OGE) regulations contain additional requirements for disqualification of employees who are “seeking employment.” 5 C.F.R. §§ 2635.601 - 2635.606. “Seeking employment” is a term broader than “negotiating for employment” found in 18 U.S.C. § 208.

3. Negotiating for employment is the same as buying stock in a company. Any discussion, however tentative, is negotiating for employment. Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest. If an employee could own stock in a company without creating a conflict of interest with his official duties (i.e. the company does not do business with the Department, or, the stock is below the threshold to create a conflict), then that person may negotiate for employment with that company. No special action is required. Note the current threshold for de minimis stock holding is found at 5 C.F.R. § 2640.202(a)(2).
4. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.
5. An employee begins “seeking employment” if he or she has directly or indirectly:
 - a. Engaged in employment negotiations with any person. “Negotiations” means discussing or communicating with another person, or that person’s agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).
 - b. Made an unsolicited communication to any person or that person’s agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).
 - c. Made a response other than rejection to an unsolicited communication from any person or that person’s agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).
6. An employee has not begun “seeking employment” if he or she makes an unsolicited communication for the following reasons:
 - a. For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).
 - b. For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).

7. An employee is no longer “seeking employment” under the following circumstances:
 - a. The employee rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).
 - b. Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).

9. Disqualification and Waiver.

- a. With the approval of his or her supervisor, the employee must disqualify or change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required. JER § 2-204(c).
- b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640.

G. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. 18 U.S.C. § 216. In addition, a fine of \$50,000 to \$250,000 is possible. See 18 U.S.C. § 3571.

VIII. THE PROCUREMENT INTEGRITY ACT (PIA). On January 4, 2011, the Procurement Integrity Act was codified for the first time at 41 U.S.C. 2101-2107. The new codified statute does not have a name but will be referred to in this deskbook as “the Procurement Integrity Act.” Prior to January 4, 2011, the uncodified law was found at Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423. Codification did not make any changes to the old Procurement Integrity Act passed effective 1997.

A. Background Information about the former Procurement Integrity Act (PIA).

1. Effective date: January 1, 1997. (this has not changed as a result of the codification)
2. The basic provisions of the statute are set forth in FAR 3.104-2.
 - a. Prohibitions on disclosing and obtaining procurement information apply beginning January 1, 1997 to:
 - (1) Every competitive federal procurement for supplies or services,
 - (2) From non-Federal sources,
 - (3) Using appropriated funds.
 - b. Requirement to report employment contacts applies beginning January 1, 1997 to competitive federal procurements above the simplified acquisition threshold (\$150,000).
 - c. Post-employment restrictions apply to former officials for services provided or decisions made on or after January 1, 1997.
 - d. Former officials who left government service before January 1, 1997 are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.
3. Interference with duties. An official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action), if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-8. See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).
4. Coverage. Applies to "persons," "agency officials," and "former officials" as defined in the PIA.
5. Department of Defense Guidance Regarding Procurement Integrity Law.

Updated Guidance on Application of the Procurement Integrity Act (PIA) and Regulations, July 12, 2011
http://www.defenselink.mil/dodgc/defense_ethics/. (under “ethics resource library”, “DoD Guidance”)

- B. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.
1. Restrictions on Disclosure of Information. 41 U.S.C. § 2102(a)(3). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:
 - a. Present or former federal officials;
 - b. Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement;
 - c. Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and
 - d. Persons who have access to such information by virtue of their office, employment, or relationship.
 2. Restrictions on Obtaining Information. 41 U.S.C. § 2101(b). Persons (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information.
 3. Contractor Bid or Proposal Information. 41 U.S.C. § 2101 (2)(A-D). Defined as any of the following:
 - a. Cost or pricing data;
 - b. Indirect costs or labor rates;
 - c. Proprietary information marked in accordance with applicable law or regulation; and

d. Information marked by the contractor as such in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4(d). See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

4. Source Selection Information. 41 U.S.C. § 2101 (7). Defined as any of the following:

a. Bid prices before bid opening;

b. Proposed costs or prices in negotiated procurement;

c. Source selection plans;

d. Technical evaluation plans;

e. Technical evaluations of proposals;

f. Cost or price evaluations of proposals;

g. Competitive range determinations;

h. Rankings of bids, proposals, or competitors;

i. Reports and evaluations of source selection panels, boards, or advisory councils; and

j. Other information marked as source selection information if release would jeopardize the integrity of the competition.

C. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is **participating personally and substantially** in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5(a).
 - a. Report must be in writing. 41 U.S.C. § 2103(a)(1)
 - b. Report must be made to supervisor and designated agency ethics official. 41 U.S.C. 2103(a)(1)
 - (1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.
 - (2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.
 - (3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3 as defined at 3.104-1.
 - c. Additional Requirements. The agency official **must**:
 - (1) Promptly reject employment; 41 U.S.C. § 2103(a)(2A) or
 - (2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208. 41 U.S.C. § 2103(a)(2A).
 - (a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the Head of the Contracting Activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).
 - (b) Note: 18 U.S.C. § 208 requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts.

2. Both officials and bidders who engage in prohibited employment contacts are subject to criminal and civil penalties and administrative actions.
3. Participating personally and substantially means active and significant involvement in:
 - a. Drafting, reviewing, or approving a statement of work;
 - b. Preparing or developing the solicitation;
 - c. Evaluating bids or proposals, or selecting a source;
 - d. Negotiating price or terms and conditions of the contract; or
 - e. Reviewing and approving the award of the contract. FAR 3.104-1.
4. The following activities are generally considered **not** to constitute personal and substantial participation:
 - a. Certain agency level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;
 - b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;
 - c. Clerical functions in support of a particular procurement; and
 - d. Below listed activities for OMB Circular A-76 cost comparisons:
 - (1) Participating in management studies;
 - (2) Preparing in-house cost estimates;
 - (3) Preparing “most efficient organization” (MEO) analyses; and

- (4) Furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

(Note that 18 U.S.C. § 208 may preclude participation even if the FAR would appear to allow it. Both have to be considered before making a determination. See 48 C.F.R. § 3.104-3(c)(4))(FAR 3.104-3(c)(4)).

D. Post-Government Employment Restrictions.

1. A one-year ban prohibits certain persons from accepting compensation from the awardee. “Compensation” means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual. FAR 3.104-1. The ban applies to both competitively awarded and non-competitively awarded procurements. FAR 3.104-3.
2. The one-year ban applies to persons who serve in any of the following seven positions on a contract **in excess of \$10 million**:
 - a. Procuring Contracting Officer (PCO);
 - b. Source Selection Authority (SSA);
 - c. Members of the Source Selection Evaluation Board (SSEB);
 - d. Chief of a financial or technical evaluation team;
 - e. Program Manager;
 - f. Deputy Program Manager; and
 - g. Administrative Contracting Officer (ACO).
3. The one-year ban also applies to anyone who “personally makes” any of the following seven types of decisions:

- a. The decision to award a contract **in excess of \$10 million;**
 - b. The decision to award a subcontract **in excess of \$10 million;**
 - c. The decision to award a modification of a contract or subcontract **in excess of \$10 million;**
 - d. The decision to award a task order or delivery order **in excess of \$10 million;**
 - e. The decision to establish overhead or other rates valued **in excess of \$10 million;**
 - f. The decision to approve issuing a payment or payments **in excess of \$10 million;** and
 - g. The decision to pay or settle a claim **in excess of \$10 million.**
4. The Ban Period.
- a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.
 - b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.
 - c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.
 - d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-4(d)(2).
5. In “excess of \$10 million” means:

- a. The value or estimated value of the contract including options;
 - b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;
 - c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
 - d. The value of a delivery order, task order, or order under a Basic Ordering Agreement;
 - e. The amount paid, or to be paid, in a settlement of a claim; or
 - f. The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. See FAR 3.104-3.
- 6. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services.
 - 7. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor. FAR 3.104-6(a).

E. Penalties and Sanctions.

- 1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage. 41 U.S.C. § 2105(a).
- 2. Civil Penalties.
 - a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment. 41 U.S.C. § 2105(b).

- b. Civil penalty is up to \$50,000 (individuals) and up to \$500,000 (organizations) plus twice the amount of compensation received or offered.
3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. 48 C.F.R. § 52.203-8. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. 48 C.F.R. § 52.203-10.
4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the Procurement Integrity Act); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed.Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).
5. Limitation on Protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. FAR 33.102(f).
6. Contracting Officer's Duty to Take Action on Possible Violations.
 - a. Determine impact of violation on award or source selection.
 - b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.
 - c. If impact on procurement, forward information to the Head of the Contracting Activity (HCA) or designee. Take further action in accordance with HCA's instructions. FAR 3.104-7.

F. Private Employment Restrictions

1. 41 U.S.C. § 423 repealed 10 U.S.C. sections 2397, 281 and 37 U.S.C. 801. DD Form 1787, a form completed by private employers about former employees and sent to DoD is no longer required. (41 U.S.C. § 423 was replaced by 41 U.S.C. §§ 2101-07).

IX. GIFTS FROM PROSPECTIVE EMPLOYERS. 5 C.F.R. § 2635.204(e)(3)

- A. Travel, Meals and Reimbursements for job interviews. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly situated job applicants. 5 C.F.R. § 2635.602(b) and 5 C.F.R. § 2635.204(e)(3). (Note the need for disqualification by the employee if the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties). Personnel who file financial disclosure reports (SF 278 and OGE Form 450) must report such payments on their subsequent financial disclosure report.

X. TERMINAL LEAVE

- A. May work while on terminal leave.

- B. Financial Disclosure form filers (450/278) must obtain agency designee approval if employer will be prohibited source

1. Active Duty Officers may not accept outside employment that will interfere with duty performance or require separation from service 10 U.S.C. § 973(a)

- C. Including a current Government employee's resume in a solicitation by a contractor to an agency may be permissible where the employee had no responsibility for the subject procurement, never had responsibility for the contractor, did not have any role in preparing the contractor's proposal, does not work for the procuring agency, and has brought to the attention of his superior and the agency ethics official his intentions regarding use of the resume. OGE opinion 98 x 5.
<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2147483803>.

- D. Cannot hold a civil office during Terminal Leave.

1. Civil Office Statute 10 U.S.C. § 973

2. Active Duty Military Officers may not hold Civil Office
 - a. Federal/State/Local
 - b. Exercise Sovereign Power
 - c. USA/DA/City Attorney/County Clerk
 - d. Note Directive 1344.10, section 4.2.4.1 which states as follows: “Any enlisted member on active duty may seek, hold, and exercise the functions of a nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties.”
- E. A military officer may not accept “civil office” with a state or local Government, nor may an officer perform the duties of such civil office while on terminal leave. 10 U.S.C. § 973(b). A “civil office” is a position in which some portion of a state’s sovereign power is exercised. For example, a county clerk position is considered a “civil office.” In the Matter of Major Robert C. Crisp, USAF, 56 Comp. Gen. 855 (1977). By regulation, DoD Directive 1344.10, this prohibition applies to enlisted personnel, but does not apply to civilian personnel.
- F. If not a “civil office”
 1. May receive pay for Federal position and military pay and allowances during terminal leave. 5 U.S.C. § 5534a; DoD Directive 1344.10
- G. Cannot act as an agent for another before any Federal agency. 18 U.S.C. §§ 203/205. Military officers working on terminal leave (like all Federal employees) are prohibited by 18 U.S.C. §§ 203 and 205 of representing their new employer to the Government. This makes problematic the increasingly common practice of contractor personnel physically working in Government offices. Being present in Government offices on behalf of a contractor inherently is a representation. Of course, military officers on terminal leave may begin work with the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Government workplace. Enlisted members are not subject to 18 USC §§ 203 or 205.

XI. DUAL COMPENSATION LAWS

- A. Section 651 of the NDAA for FY 2000 (P.L. 106-65) repealed 5 U.S.C. § 5532 in its entirety.
- B. No reduction in retired or retainer pay for retired members of the Armed Forces who are employed in Federal civilian positions.

XII. 6-MONTH COOLING OFF PERIOD

- A. No civilian employment within DoD for 6 months after leaving military. 5 U.S.C. § 3326.
- B. Applies to all retired military members
- C. Waivers available from Secretary of hiring component
- D. Limitation lifted during national emergency. Note Presidential Proclamation Declaring Emergency for one year from September 13, 2011 at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-13/pdf/2011-23609.pdf>, September 13, 2012.

XIII. REPRESENTATIONAL PROHIBITIONS. 18 U.S.C. § 207.

- A. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees which may reasonably give the appearance of making unfair use of their prior employment and affiliations.
 - 1. A former employee involved in a particular matter while working for the government must not “switch sides” after leaving government service to represent another person on that matter. 5 C.F.R. § 2637.101.

2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a “flow of skills” promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts “detrimental to public confidence.” 5 C.F.R. § 2637.101.
- B. 18 U.S.C. § 207 applies to all former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of “officer or employee” in 18 U.S.C. § 202. Note: Employees on terminal leave must also heed the representation restrictions of 18 U.S.C. § 205, which apply to current government employees.
- C. 18 U.S.C. § 207(a)(1) imposes a **lifetime prohibition** on the former employee against communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the government, when:
1. The government is a party, or has a direct and substantial interest in the matter;
 2. The former officer or employee participated personally and substantially in the matter while in his official capacity; and
 3. At the time of the participation, specific parties other than the government were involved.
 4. Note that when the term “lifetime” is used, it refers to the lifetime of the particular matter. To the extent the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.
- D. 18 U.S.C. § 207(a)(2) prohibits, for **two years** after leaving federal service, a former employee from communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the government, when:
1. The government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and
 3. At the time of the participation, specific parties other than the government were involved.
- E. 18 U.S.C. § 207(b) prohibits former officers and employees for one year from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information that they had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon separating or retiring from Government service and, unlike the restrictions of provisions of 18 U.S.C. § 207(a)(1) or (2) discussed above, prohibits former officials from providing “behind-the-scenes” assistance on the basis of the covered information to any person or entity. This restriction applies only if the former official was personally and substantially involved in ongoing trade or treaty negotiations within the last year of his Government service. It is not necessary that the former official have had contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. The treaty negotiations covered by this section are those that result in international agreements that require the advice and consent of the Senate. 207(b)(2)(2)(B). The trade negotiations covered are those that the President undertakes under 1102 of the Omnibus Trade and Competitiveness Act of 1988. 207(b)(2)(A). A negotiation becomes “ongoing” at the point when both (1) the determination has been made by competent authority that the outcome of the negotiation will be a treaty or trade agreement, and (2) discussions with a foreign government have begun on a test.
- F. 18 U.S.C. § 207(c) prohibits, for **one year** after leaving federal service, “senior employees” (military personnel 0-7 and above, and civilian personnel whose rate of basic pay exceeds 86.5 percent of the rate for level II of the Executive Schedule (EL II) (\$155,440.50 in 2011) (see National Defense Authorization Act for Fiscal Year 2004, section 1125) from communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the government, when:
1. The communication or appearance involves the department or agency the officer or employee served during his last year of Federal service as a senior employee;
 2. The communication or appearance is on behalf of any other person (other than the Government);

3. 18 U.S.C. § 207(h) permits DoD to be divided into components for purposes of restrictions imposed by 207(c). DoD components are listed in Appendix B to 5 C.F.R. § 2641. At present, the DoD components are: Air Force, Army, Navy, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, National Geospatial-Intelligence Agency (formerly the National Imagery and Mapping Agency), Defense Threat Reduction Agency, National Security Agency, and the National Reconnaissance Office.
4. Generals and Admirals, who retire from agencies other than their respective military services, are considered to have been detailed to those agencies, and they are prohibited by section 207(c) from communicating back to both their agency and military service. (See 18 U.S.C. § 207(h)).

Thus, a Navy Admiral in a Navy billet is prohibited from communicating, as an official action, with Navy officials. However, the officer may communicate with representatives of other services and OSD provided that the officials are not Navy officials and OSD is not the agency that the Admiral was detailed.

5. Note that (S.1, P.L. 110-81), amended 18 U.S.C. 207(d) that specifically bans the Secretary of Defense from communicating or appearing for two years before
 - (a) any officer or employee of any Department or agency in which such person served in such a position within a period of 1 year before such person's service or employment with the United States Government terminated, and
 - (b) before all employees listed by position on the Executive Schedule in all agencies of the executive branch. (18 U.S.C. 207(d)).
 6. Speaking before Department during one-year "cooling off"—note that under the Post-employment regulation, former personnel subject to 207(c) may speak before personnel from their former Department under the following conditions: the sponsoring entity for the panel or seminar is not the Federal Government including Congress and Judicial branches or a Federal corporation; if the sponsor of the event is private, then there still must be a large number of attendees, and a significant portion cannot be U.S. Government personnel 5 C.F.R. 2641.201(f)(3). <http://edocket.access.gpo.gov/2008/pdf/E8-13394.pdf>
- G. 18 U.S.C. § 207 **does not** prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.

1. The statute does not bar behind the scenes involvement. But see January 19, 2001 opinion from the Department of Justice to the Office of Government Ethics suggesting that a former employee who is the sole proprietor of a business “working behind the scenes” may constitute “communication with the intent to influence” Government decisions. <http://www.justice.gov/olc/207cfinal.htm>.
 2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.
- H. 18 U.S.C. § 207(f) prohibits former senior employees (Admirals, Generals, personnel whose rate of basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II), for a period of 1 year after leaving office from
1. Representing foreign entities before any official of the Government with the intent to influence that official regarding his or her official duties, or
 2. Aiding or advising a foreign entity with the intent to influence a Government official regarding his or her official duties. A “foreign entity” includes foreign governments, foreign political parties, and groups exercising de facto political jurisdiction over a country. Foreign commercial corporations are generally not considered “foreign entities” unless they exercise the functions of a sovereign.

NOTE: The Office of Government Ethics issued DAEOgram DO-04-031 on October 5, 2004, attaching an Office of Legal Counsel opinion dated June 22, 2004 concerning the question of whether 18 U.S.C. § 207(f) covers post-employment contacts with Members of Congress. The OLC opinion concludes that section 207(f) does cover representational contacts with Members of Congress.

The daeogram can be found at:

<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2197>.

The OLC Opinion can be found at:

http://www.justice.gov/olc/oge_op2_22jun04.htm.

- I. State and Local Governments and Institutions, Hospitals and organizations.

1. The restriction in 18 U.S.C. § 207(c) does not apply to appearances, communications, representation by a former senior employee who is an employee of a state or local government, an employee of certain accredited degree-granting institutions of higher education, or an employee of a nonprofit, tax-exempt hospital or a medical research institution if the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization. 18 U.S.C. § 207(j)(2).

- J. Special Knowledge. This exception provides that the restriction in section 207(c) does not apply to a former senior employee who makes a statement, which is based on his own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received. 18 U.S.C. § 207(j)(4).

- K. Scientific or Technological Information. Section 207 provides an exception from its provisions for communications made solely for the purpose of furnishing scientific or technological information. The exception does not apply to trade and treaty negotiations, and on restrictions on former senior employees representing aiding, and advising foreign entities. 18 U.S.C. § 207(j)(5). Procedures for using this exception include obtaining a certificate of exception after consulting with the Office of Government Ethics and publication in the Federal Register. *Id.* At DoD, the procedures are set forth in 9-400 of DoD Directive 5500.07-R which does not require publication in the Federal Register.

- L. Testimony. A former employee may give testimony under oath or make a statement required to be made under penalty of perjury. Former personnel may give expert opinion testimony, however, only if given pursuant to a court order or if not otherwise subject to the lifetime bar (18 U.S.C. § 207(a)) as it relates to the subject matter of the testimony. 18 U.S.C. § 207(j)(6).

- M. Contract advice by former details. Personnel from a private organization assigned to an agency under the Information Technology Exchange Program, 5 U.S.C. § 3701, cannot within one year after the end of that assignment, knowingly, represent or aid, counsel or assist in representing any other person (except the United States) in connection with any contract with that agency.

- N. Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement date. Two restrictions apply to non-government employment during terminal leave:

1. Section 205 of title 18, United States Code, is a criminal statute that prohibits a military officer (not enlisted personnel) or Federal civilian employee from representing any entity other than the United States before any Federal court or agency. Similarly, 18 U.S.C. § 203 prohibits officer and civilian employees from “directly or indirectly” receiving compensation for representation services rendered “either personally or by another” before the U.S. Government. These provisions apply while a military officer remains on terminal leave. They no longer apply to a military officer after his retirement. 18 U.S.C. § 206.
2. A military officer may not accept “civil office” with a state or local Government, nor may an officer perform the duties of such civil office while on terminal leave. JER § 9-901(b); 10 U.S.C. § 973(b). A “civil office” is a position in which some portion of a state’s sovereign power is exercised. For example, a county clerk position is considered a “civil office.” In the Matter of Major Robert C. Crisp, USAF, 56 Comp. Gen. 855 (1977). By regulation, DoD Directive 1344.10, this prohibition applies to enlisted personnel, but does not apply to civilian personnel.

P. Executive Order 13490 (January 21, 2009 and the Pledge)

WHO: Applies to Full time non-career Presidential Appointees, non-career Senior Executive Service (SES) appointees, and non-career appointees excepted from the competitive service by reason of being of a confidential or policymaking character (e.g., Schedule C, politically appointed term SES or equivalent)

WHAT: Once leaving Federal service, a *senior official* may not communicate with, *lobby* back to, or represent another before his or her former DoD agency for two (2) years.

- “Senior official” is any appointee referred to in “who” above whose base pay is at or above 86.5% of the rate of Executive Schedule Level II (\$155,440.50 in 2011).
- This restriction applies only to the official’s former DoD component; it does not apply to the entire DoD or other Executive Branch agencies.
- This restriction does not apply to “behind the scenes” assistance.
- E.g., as a former senior OSD official, the official would be prohibited from representing his or her new employer back to OSD, which includes all subcomponents including the COCOMS and many defense agencies, for two (2) years after leaving Government service, but the official, as long as they are not a Presidential appointee confirmed by the Senate, could communicate and represent his or her new employer back to the Department of Navy, Department of Army, Department of Air Force, DISA, DIA, DLA, NGA, NRO, DTRA or NSA.

For all political appointees, once leaving Federal service, they may not *lobby* back to any Flag/General officer or political appointee in the Federal Government for the duration of President Obama's Administration.

XIV. FOREIGN GOVERNMENT EMPLOYMENT (U.S. CONSTITUTION)

- A. Since retired military personnel are subject to recall, they are prohibited by the emoluments clause of the Constitution from being employed by Foreign Governments, without the consent of Congress. Congress has given consent.
1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary. Note that these waivers often take 3 or 4 months to be approved, so plan accordingly.
- a. U.S. Army Human Resources Command
ATTN: Army Personnel Records Division AHRC-PDR-RCR
1600 Spearhead Division Avenue DEPT #420
Fort Knox, KY 40122-5402
Telephone 1-800-833-6622
 - b. Guidance for Air Force Personnel on this subject is found in Air Force Instruction 36-2913, *Request for Approval of Foreign Employment of AF Personnel* (19 Nov 03). The responsible office is: HQ AFPC/DPPTF, 550 C Street West, Randolph AFB, Texas 78150-4739. Telephone number is COM 210-565-2451 or DSN 665-2461. Point of contact is Gail Weber.
 - c. For the Navy, submit written request to Navy Personnel Command, Office of Legal Counsel (Pers-OOL), 2000 Navy Pentagon, Washington, DC 20370-2000. Telephone number is 703-693-0708.
 - d. For the Marines, a retired Marine Corps member should write the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-3000. Telephone number is 703-614-1513.

2. This Constitutional requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies.
 3. When seeking employment outside of the DoD contractor community, a military retiree should always ask, "Is this company owned or controlled by a foreign government?" See "Applicability of the Emoluments Clause to Non-Government Members of ACUS", (17 Op. O.L.C. 114(October 28, 1993))
- B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2. The Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530, (202) 514-1219, can provide further information.
- C. Note that a military member may be able to work for a "newly democratic nation" but must comply with 10 U.S.C. 1060. Otherwise, note the potential of losing citizenship if a retired member decides to work for a foreign government not under 1060. 8 U.S.C. 1481(a)(3)(B) The DoD Financial Management Regulation also addresses employment by a foreign government, in Vol. 7B, Ch 5. Vol. 7B, Ch. 6 addresses loss of citizenship after retirement if working for a foreign government. Suspension of pay due to employment by a foreign government is addressed in Vol. 7B, Ch. 13.
- <http://www.defenselink.mil/comptroller/fmr/07b/index.html>

XV. MISCELLANEOUS PROVISIONS.

- A. Use of Title. Retirees may use military rank in private, commercial, or political activities as long as their retired status is clearly indicated, no appearance of DoD endorsement is created, and DoD is not otherwise discredited by the use. JER, para. 2-304.
- B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4. Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel, June 8, 1998, Chapter 6 and Table 6.1. Navy Uniform Regulations, Chapter Six, Section 10: Reserve/Retired

- C. SF 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of retirement.
- D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. § 794.
- E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than \$350 in value from foreign governments. 5 U.S.C. § 7342.
- G. Memorandum of the Deputy Secretary dated October 25, 2004, regarding Joint Ethics Regulation changes that require post employment and disqualification issues be included in annual training. This memo and the JER changes can be found under the ethics resource library, DoD Guidance, at http://www.defenselink.mil/dodgc/defense_ethics/. Also, at the same web site is the annual certification required to be signed by all public financial disclosure filers that they are aware of the post-Government service restrictions and the procurement integrity law post-Government service restrictions. The JER change also requires that ethics officials provide post-Government service employment guidance during out processing.
- H. ***The National Defense Authorization Act of 2008***, Public Law 110-181, section 847, requires that the following officials must request, and the ethics officials must provide a post employment opinion under circumstances described below. The ethics officials must maintain a database of the post government service opinions for SES, general or flag officers paid at O-7 or above, Procurement Officials set forth in 41 U.S.C. 2101, and those officials in an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code who, personally and substantially participated in an acquisition in excess of \$10,000,000 during their Federal tenure, and within two years after leaving service in the Department, expect to receive compensation from a defense contractor. These opinions must be rendered within 30 days. They must be retained for five years. The Inspector General shall conduct periodic reviews to ensure opinions are provided and retained. The Central Database is now AGEAR, After Government Employment Advisory Repository. Requesting employees enter information (no CAC required) into a form at: <https://www.fdm.army.mil/AGEAR>. Ethics counselors access AGEAR at: <https://www.fdm.army.mil/AGEAREO>.

A sample opinion is posted on the SOCO web site so that it can be provided to the persons occupying the positions described above when they receive their post-employment counseling prior to terminating Government service. The sample will be posted at: http://www.dod.mil/dodgc/defense_ethics/resource_library/pubhandout.htm.

- I. Reserve Officers. Reserve Officers are subject to the post employment law. While every situation can never be included in a summary, the SOCO web site has a quick-reference table that summarizes restrictions applicable to Reserve Officers in various situations. The table is styled as the Reserve Officer Post-Government Employment Matrix and can be found at:
http://www.dod.mil/dodgc/defense_ethics/resource_library/Reserve_Matrix.doc.

- J. OPM Notice. The Office of Personnel Management requires that Departments notify all public filers subject to 18 U.S.C. 207(c) what the restrictions are, restrictions regarding 18 U.S.C. 207(f), and the penalties for violating 18 U.S.C. 207. 5 C.F.R. part 730. The post-employment handouts on the SOCO web site customized to your agency, along with the ethics official's name, address and phone number, should be given to your Personnel office so they can include this information in their notice.

XVI. CONCLUSION.

JOB HUNTING AND POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

APPENDICES

1. Format for Written Notice of Disqualification
2. Sample Post-Government Employment Ethics
Questionnaire
3. Format for Written Ethics Advice

MEMORANDUM

TO: [Employee's Supervisor's Name, Title]
FROM: [Employee's Name, Title]
DATE:
SUBJECT: Disqualification – Employment Discussions

I anticipate commencing employment discussions with the companies listed below. In accordance with section 208 of title 18 of the United States Code, a criminal statute, and section 2635.604 of title 5 of the Code of Federal Regulations, I am disqualified from participating personally and substantially as a Government officer or employee in any particular matter that would have a direct and predictable effect on the financial interests of them, their parent companies, subsidiaries, affiliates, and joint ventures (covered parties).

I am taking the following steps to ensure that I do not participate in any particular matter affecting the covered parties:

- (1) I am instructing [Screener's Name, Title] to screen all matters directed to my attention that involve any persons or organizations outside the Federal Government, and to determine whether such matters involve the covered parties. I have directed [Screener's Name] to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.
- (2) If [Screener's Name] determines that a matter directly or indirectly involves a covered party, the matter will be referred to [Name and Title of person with authority to act on behalf of Employee] for action or assignment, without my knowledge or involvement.

- (3) I will advise my immediate subordinates of this disqualification, and also instruct them to direct all inquiries regarding matters directly or indirectly involving the covered parties to [*Name and Title of person with authority to act on behalf of Employee*], without my knowledge or involvement.

Covered Parties:

This disqualification remains in effect until further notice. In the event of changed circumstances, such as rejecting the possibility of employment with one of the covered parties or the passage of a 2 month period during which I have received no indication of interest in employment discussions from one of the covered parties, I will consult an ethics counselor, update this memorandum and notify everyone concerned.

[*Employee's Signature*]
[*Employee's Name, Title*]

cc: Standards of Conduct Office, Office of General Counsel
(Room , Pentagon) [or Agency Ethics Counselor]

[*Screener's Name*]
[*Name and Title of person with authority to act on behalf of Employee*]
[*Additional supervisors or subordinates, as appropriate*]

(*This document may be downloaded from our website at :*
http://www.defenselink.mil/dodgc/defense_ethics/resource_library/Disqual_OSD_Personnel.doc)

G: SOCGC\HANDOUT\Disqual Form (OSD)2.doc

REV: 2/15/06

POST-GOVERNMENT SERVICE ETHICS QUESTIONNAIRE

DD Form 2945 at

http://www.dod.mil/dodgc/defense_ethics/resource_library/DD2945_PostEmployment.pdf.

Post-Government Service Employment Restrictions
10th Ethics Counselor's Course

The Department of the Army has a required format for Post Government Service advice. The format for opinions is found at: <http://ogc.hqda.pentagon.mil/EandF/Documentation/guidance.aspx#P>.

March 8, 2008

Office of Command Counsel

Colonel Almost Retired, Jr.
Deputy Director, Aviation Facilities Directorate
Office of the Assistant Chief of Staff for Facility Management
400 Army Pentagon
Washington, DC 20310-0400

Dear Colonel Almost Retired:

This responds to your request for advice regarding job-hunting and post-Government employment restrictions, and is based on the following facts that you provided.

You plan to retire as a colonel by January 1, 2003, perhaps earlier. It is likely that you will take terminal leave. You have been assigned to the Aviation Facilities Directorate, Office of the Assistant Chief of Staff for Facility Management since July 19, 1994, most of the time as the Deputy Director. As such, you have been responsible for the development, integration and promulgation of policies and doctrine pertaining to the planning, programming, budgeting and operation of all Army aviation facilities. Your responsibilities have included aspects of the Aviation Facility Status Report (AFSR); in addition, you have been and are a user of the information generated by the AFSR.

You have been seeking employment with Archie Technical Integrators (ATI). As we discussed, once you send a resume or otherwise make or receive some contact concerning future employment, you are seeking employment. This means that, by law (18 U.S.C. § 208) and regulation (5 C.F.R. § 2635.604), you are disqualified from participating in any official matter that would have a direct and predictable effect on the financial interests of ATI. In your case, you are also required by the *Joint Ethics Regulation* (JER), DOD 5500.07-R, paragraph 2-204c, to issue a written notice of your disqualification, which you did on November 1, 2002.

You should also be aware that you may begin your new employment while on terminal leave. However, because you file a financial disclosure report, you are required by JER 2-206 to obtain the prior approval of your supervisor if this employment is with a prohibited source. [**Add for GOs and SESs:** Your employment agreement, position and income that occurred prior to your retirement date must be reported on your termination Public Financial Disclosure Report (OGE 278).] Finally, if you are employed during your terminal leave, you are prohibited by 18 U.S.C. § 205 from representing your new employer, or anyone else for that matter, before any department, agency or employee of the Federal Government.

Post-Government Service Employment Restrictions
10th Ethics Counselor's Course

In my opinion, based on the information that you provided, the procurement integrity law, 41 U.S.C. § 2101, does not require any additional notices with respect to your employment contacts with ATI. In addition, the procurement integrity law does not restrict you from receiving compensation from ATI, or any other Department of Defense contractor for that matter.

However, the procurement integrity law does apply to you to the extent that you have had access to any source selection or contractor bid or proposal information, and it continues to protect that information. In addition, 18 U.S.C. §§ 793, 794 and 1905 protect and prohibit the use or disclosure of trade secrets, confidential business information, and classified information. Finally, you have a continuing obligation to the Government not to disclose or misuse any other information that you acquired as part of your official duties and which is not generally available to the public.

A criminal statute, 18 U.S.C. § 207, will restrict your representational activities. It prevents an individual who participated in, or was responsible for, a particular matter while employed by the Government from later "switching sides" and representing someone else in the same matter. [***Add for GOs and SESs (level exceeding 86.5 per cent of the rate for level II of the Executive Schedule (EL II)):*** It also provides additional restrictions for former general officers and senior employees.]

a. Section 207(a)(1) imposes a lifetime bar that prohibits you from knowingly making, with the intent to influence, any communication to or even an appearance before an employee of the United States on behalf of someone else in connection with a particular matter involving a specific party in which you participated personally and substantially as a Government officer and in which the United States has a direct and substantial interest. This does not prohibit "behind-the-scenes" assistance.

"Particular matter" includes any proceeding, application, contract, controversy, investigation, accusation, arrest, or other particular matter that involves a specific party.

"Participate personally and substantially" means to participate directly and significantly by decision, approval, disapproval, recommendation, advice, or investigation. Personal participation includes the participation of a subordinate when actually directed by you.

b. Section 207(a)(2) is nearly identical to the above lifetime restriction except that it (1) lasts for only two years after leaving Government service (rather than life) and (2) applies only to those matters in which you did not participate personally and substantially, but which were pending under your official responsibility during the one-year period before terminating Government employment. "Official responsibility" is defined as direct administrative or operating authority to approve, disapprove, or otherwise direct government action.

[Add for GOs and SESs (levels where basic pay exceeds 86.5 per cent of the rate for level II of the Executive Schedule (EL II)):

[c. Because you are a general officer, section 207(c)(1) prohibits you for one year after your retirement from contacting any officer or employee of the Department of the Army on behalf of someone else with the intent to influence any official matter.

[d. Further, also because you are a general officer, section 207(f) prohibits you for one year after your retirement from representing or aiding or advising a foreign government or political entity (but not a non-government corporation) to influence a decision of any officer, employee or agency of the United States.]

Your prospective duties with ATI as a Senior Technician would include working on the contract if awarded to them that results from Request for Proposals (RFP) DATT-96-R-0193. It will be an umbrella contract to provide technical support to all parts of the AFSR, including the integration of its parts. The expectation is that you would interact and deal with Army officials on behalf of AFSR concerning contract performance.

a. You advised me that you did not participate at all in the procurement process for any portion of this umbrella technical support requirement, to include the statement of work, specifications, purchase request documents, acquisition strategy discussions, or solicitation preparation and issuance. In that case, in my opinion, you have not participated personally and substantially in the particular matter involving specific parties, *i.e.*, the RFP and the resulting contract.

b. You also advised me that your Directorate had functional responsibility for the fielding of Part I of the AFSR (until May 20, 1996) and for the integration of the various parts of the AFSR (until June 20, 1996). However, this functional responsibility did not include participation in any way in the procurement process for the RFP requirement by those working for you. Those working for you did not help put together the RFP. Accordingly, in my opinion, the particular matter involving specific parties (*i.e.* the RFP and the resulting contract) was not under your official responsibility during your last year of Federal service.

Accordingly, in my opinion, neither 18 U.S.C. § 207(a)(1) nor 18 U.S.C. § 207(a)(2) prevents you from representing ATI before the Army and attempting to influence official action with respect to the contract resulting from the RFP. However, you must wait until you are actually retired. If you are on terminal leave, 18 U.S.C. § 205 prohibits any officer or employee from representing ATI or any other non-Federal entity back to any part of the Federal Government with the intent to influence official actions.

As a final point, my opinion as an agency ethics official concerning 18 U.S.C. § 207 does not have the same weight as an opinion authorized by statute, such as the procurement integrity law (41 U.S.C. § 2101). The *Standards of Ethical Conduct for Employees of the Executive Branch* makes it clear that, although my opinion should be persuasive concerning statutes like 18 U.S.C. § 207, my opinion on this statute does not bind the Department of Justice.

I hope that this information is helpful to you. This letter, issued under the authority of 41 U.S.C. § 2104(c) and 5 C.F.R. §§ 2635.107 and 602(a)(2), is an advisory opinion of an agency ethics official based on the information that you provided.

Sincerely,

Ethics Attorney

January 15, 2012

General.
70 Road
e, NY 16

Dear Mr.:

This replies to your request for an opinion regarding the legal propriety of undertaking certain post-employment activities. My advice with respect to these matters is advisory only. Neither the information you provided to receive this advice letter, nor the provision of this letter, creates an attorney-client relationship between you and an attorney rendering such advice.

In your Questionnaire dated January 11, 2012, you stated that you are the Director of the DO. In that role, you approved projects with a value of up to \$25 million. You reported your recommendations directly to the Deputy Secretary of Defense. You stated in your Questionnaire that you approved contracts in amounts exceeding \$10 million.

The law, at 41 U.S.C. 2101-2107, formerly known as the Procurement Integrity Act, prohibits Department of Defense (DoD) personnel from accepting compensation from certain employers. By awarding a contract over \$10 million, you are subject to this law. For a period of one year after the award date, you may not accept compensation from the vendors involved in those contracts. Other post employment laws apply regarding these contracts and regarding particular matters you worked on involving specific parties.

Certain current or former DoD officials who, within two years of leaving DoD, expect to receive compensation from a defense contractor must request and receive a written opinion regarding the applicability of post-employment restrictions to activities that official may undertake on behalf of a defense contractor before receiving pay. This requirement is in Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)(Section 847). It applies if you are a current or former DoD official who participated personally and substantially in an acquisition with a value in excess of \$10M while serving in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team.

Post-Government Service Employment Restrictions
10th Ethics Counselor's Course

Since you have been involved personally and substantially in an acquisition with a value in excess of \$10 million which serving as the Under Secretary of Defense , you are subject to Section 847, and this letter satisfies the requirements of that section.

In addition, other laws and regulations may apply to your job search and the type of work you may perform for a private employer. They are discussed below.

A criminal statute, section 208 of title 18, United States Code, prohibits a Government employee from participating “personally and substantially” in any “particular Government matter” in which a private entity has a financial interest, if the employee is negotiating employment with the private entity or has an arrangement for future employment with the private entity. This restriction applies to matters in which the employee participates “personally and substantially” through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. A “particular matter” may be a judicial or administrative proceeding, an application, request for ruling or other determination, contract, claim, controversy, charge or any other particular matter. To participate “personally” means to do so directly and includes directing a subordinate to take action. “Substantial” means that an employee’s involvement was of significance to the matter.

To avoid the broad reach of this conflict of interest statute, while employed by the Federal Government, you must disqualify yourself from taking any Government action with respect to a prospective private employer with whom you are seeking employment or have an arrangement for future employment. Generally, disqualification does not apply if your prospective employer is the Department of Defense or another agency of the Federal Government.

You are considered to be seeking employment if you engage in negotiations with particular prospective employers or send them a resume, until such time as you reject an offer, the prospective employers reject your application, or 60 days pass without a response to your resume. Disqualification is accomplished through not participating in the matter. You should notify, in writing, your supervisor, ethics counselor, immediate subordinates, and prospective employer of your disqualification.

As an exception to the general rule prohibiting the acceptance of gifts from outside sources, you may accept travel benefits, including meals, lodging, and transportation, provided by a prospective employer, even a DoD contractor, provided the benefits are tendered in connection with bona fide employment negotiations. The only caveat is that you must provide your disqualification notice before accepting these benefits.

Several other statutory restrictions may limit the type or scope of activities in which you may engage after separating. For example, for a period of one year after leaving your position, you may not make any communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of the Department in which you served within one year prior to leaving your position, in connection with any matter on which official action is

sought by such individual. (18 U.S.C. 207(c)). You may, however, during that “one year cooling off” communicate with the following DoD entities that you were neither an employee or detailee: Army, Air Force, Navy, DISA, DIA, DLA, NGA, NRO, DTRA and NSA.

You may not, in accordance with 18 U.S.C. 207 (a), communicate with any part of the Executive or Judicial branches of the Government, on behalf of any other person or entity, with the intent to influence the Government on any matter in which you were personally and substantially involved while still in Government service. Further, in accordance with 18 U.S.C. 207(a)(2), for two years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

Nor may you, for example, engage in a financial transaction using non-public information or allow the improper use of non-public information to further your own private interests or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. Inside information includes information that is not generally available to the public and obtained by reason of your official duties or position. While you can capitalize on your professional skills and knowledge, you cannot use inside information to do so.

These restrictions are complex. They are explained in detail in other materials I have provided to you. If you have any doubts about the propriety of a particular course of action, you should obtain advice before acting to ensure that you do not unwittingly violate one of these statutes. Please contact me at (703) - or by email at you have further questions.

Sincerely,

Deputy Designated Agency Ethics Official
Office of the General Counsel
Department of Defense

Encl:
Post-employment restrictions 2012
Procurement Integrity Act Restrictions

Post-Government Service Employment Restrictions
10th Ethics Counselor’s Course